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FIRST GENERAL COUNSEL'S REPORT

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MUR: 6869R
REMAND RECEIVED: Feb. 1, 2017
ORIGINAL COMPLAINT RECEIVED:
Sept. 11, 2014
Nov. 25, 2014
Apr. 15, 2015
REMAND NOTIFICATION: Feb. 2, 2017
DATE ACTIVATED: Feb. 1, 2017

STATUTE OF LIMITATIONS: Sept. 1, 2017

COMPLAINANTS:

Level the Playing Field, Inc.
Dr. Peter Ackerman

RESPONDENTS:

Commission on Presidential Debates
Frank Fahrenkopf Jr., Co-Chair
Michael D. McCurry, Co-Chair
Janet H. Brown
Howard G. Buffet
John C. Danforth
John Griffen
Antonia Hernandez
John I. Jenkins
Newton N. Minow
Richard D. Parsons
Dorothy S. Ridings
Alan K. Simpson

MUR: 6942R
REMAND RECEIVED: Feb. 1, 2017
ORIGINAL COMPLAINT RECEIVED:
June 17, 2015
Oct. 21, 2015
REMAND NOTIFICATION: Feb. 2, 2017
DATE ACTIVATED: Feb. 1, 2017

STATUTE OF LIMITATIONS: Sept. 1, 2017

COMPLAINANTS:

Green Party of the United States
Libertarian National Committee, Inc.

17044411878

RESPONDENTS:

Commission on Presidential Debates
Frank Fahrenkopf Jr., Co-Chair
Michael D. McCurry, Co-Chair
Janet H. Brown
Howard G. Buffet
John C. Danforth
John Griffen
Antonia Hernandez
John I. Jenkins
Newton N. Minow
Richard D. Parsons
Dorothy S. Ridings
Alan K. Simpson

**RELEVANT STATUTES AND
REGULATIONS:**

52 U.S.C. § 30103
52 U.S.C. § 30104
52 U.S.C. § 30116(a)
52 U.S.C. § 30116(f)
52 U.S.C. § 30118(a)
11 C.F.R. § 110.13(a)
11 C.F.R. § 110.13(c)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

These matters are before the Commission on remand from the United States District Court for the District of Columbia following its decision in *Level the Playing Field v. FEC*, No. 1:15-cv-01397 (D.D.C. Feb. 1, 2017). At issue in the case was the Commission's prior determination that there is no reason to believe the Commission on Presidential Debates ("CPD") and its then-co-chairs, Frank Fahrenkopf Jr. and Michael D. McCurry, made or accepted prohibited corporate contributions by failing to comply with the Commission's regulations on debate sponsorship in hosting its 2012 presidential and vice-presidential general elections debates. The court also reviewed the Commission's finding that there is no reason to believe CPD failed to register and report as a political committee. The district court concluded that the Commission acted "arbitrarily and capriciously in its enforcement decisions by failing to address

evidence or articulate its analysis" and ordered the Commission to issue a new decision consistent with its Opinion.¹

In accordance with the court's instructions, the Office of General Counsel ("OGC") has reconsidered the full scope of the available information.² On the basis of that review, OGC has concluded that the available information does not support a reasonable inference³ that CPD "endorses, supports, or opposes" federal candidates or political parties or failed to use "objective criteria" in selecting its 2012 debate participants. We therefore recommend that the Commission find no reason to believe that CPD, Fahrenkopf and McCurry as co-chairs, and the ten named staff and board members (collectively, "Respondents") violated 52 U.S.C. §§ 30116(f) or 30118(a) by making prohibited contributions and expenditures and accepting prohibited contributions, and no reason to believe that CPD violated 52 U.S.C. §§ 30103 or 30104 by failing to register and report as a political committee.

¹ *Level the Playing Field v. FEC*, No. 1:15-cv-01397, 2017 WL 437400 at *13 (D.D.C. Feb. 1, 2017).

² See Compl., MUR 6869 (Sept. 11, 2014) ("6869 Compl."); Resp. of CPD, Fahrenkopf, and McCurry, MUR 6869 (Dec. 15, 2014) ("6869 CPD Resp."); First Supp. Compl., MUR 6869 (Nov. 25, 2014) ("6869 Supp. Compl. #1"); Second Supp. Compl., MUR 6869 (Apr. 15, 2015) ("6869 Supp. Compl. #2"); Supp. Resp. of CPD, Fahrenkopf, and McCurry, MUR 6869 (May 26, 2015) ("6869 Supp. CPD Resp."); see also Compl. MUR 6942 (June 17, 2015) ("6942 Compl."); Resp. of CPD, Fahrenkopf, and McCurry, MUR 6942 (July 1, 2015) ("6942 CPD Resp."); Supp. Compl., MUR 6942 (Oct. 21, 2015) ("6942 Supp. Compl."); Supp. Resp. of CPD, Fahrenkopf, and McCurry, MUR 6942 (Nov. 18, 2015) ("6942 Supp. CPD Resp. ").

Consistent with the court's instructions, OGC also notified ten CPD board and staff members that had been named as respondents in these matters but not previously notified and provided each with an opportunity to respond. Janet H. Brown, Howard G. Buffet, John C. Danforth, John Griffen, Antonia Hernandez, John I. Jenkins, N. Minow, Richard D. Parsons, Dorothy S. Ridings, and Alan K. Simpson responded jointly on March 6, 2017. Resp. of Janet H. Brown, Howard G. Buffet, John C. Danforth, John Griffen, Antonia Hernandez, John I. Jenkins, N. Minow, Richard D. Parsons, Dorothy S. Ridings, and Alan K. Simpson, MURs 6869R & 6942R (Mar. 6, 2017) ("CPD Dir. Resp."), and our recommendations reflect the information presented therein.

³ See *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12545, 12546 (Mar. 16, 2007) (explaining circumstances supporting a no-reason-to-believe finding).

II. FACTUAL BACKGROUND

CPD is a nonprofit corporation formed under Section 501(c)(3) of the Internal Revenue Code⁴ to "organize, manage, produce, publicize and support debates for the candidates for President of the United States."⁵ The organization derives its funding from a variety of sources, including corporations, foundations, universities, and private donations.⁶

According to information presented by both the Complainants and Respondents, CPD was created in response to the recommendations of two studies on presidential debates from the Georgetown University Center for Strategic and International Studies and the Harvard University Institute of Politics.⁷ Both studies observed the educational value of presidential debates and proposed mechanisms to guarantee them as a permanent part of the electoral process.⁸ Among other recommendations, the studies called upon the Democratic and Republican Parties to play a role in institutionalizing the debates in order to ensure the participation of leading candidates⁹ who, as recent history had shown, at times had a disincentive to participate.¹⁰ In response, the

⁴ 26 U.S.C. § 501(c)(3).

⁵ 6869 Compl. Ex. 100 (IRS Form 1023, *Application for Recognition of Exemption for the Commission on Presidential Debates* (Mar. 5, 1987)); 6942 Compl. Ex. 100 (same). The CPD also staged three presidential debates and one vice-presidential debate in the 2016 election cycle. CPD Dir. Resp. Ex. 4 (Supp. Declaration of Janet H. Brown) ("Supp. Brown Decl.").

⁶ 6869 Compl. Ex. 4 (*CPD: Our Mission*, COMM'N. ON PRESIDENTIAL DEBATES, <http://www.debates.org/index.php?page=about-cpd> (last visited Mar. 1, 2017)); 6942 Compl. Ex. 4 (same).

⁷ 6869 Compl. Ex. 20 (Excerpts from NEWTON N. MINOW AND CRAIG L. LAMAY, *INSIDE THE PRESIDENTIAL DEBATES* 62-63 (2008)) ("MINOW & LAMAY"); 6942 Compl. Ex. 20 (same); 6869 CPD Resp. Ex. 1 (Declaration of Janet H. Brown) ("Brown Decl."); 6942 CPD Resp. Ex. 1 (same); CPD Dir. Resp. Ex. 1 (Decl. of Frank J. Fahrenkopf) ("Supp. Fahrenkopf Decl."); CPD Dir. Resp. Ex. 2 (Decl. of Dorothy S. Ridings) ("Ridings Decl.").

⁸ MINOW & LAMAY at 63; Brown Decl. ¶ 9; Supp. Fahrenkopf Decl. ¶¶ 7-9.

⁹ MINOW & LAMAY at 63; Brown Decl. ¶ 10; Supp. Fahrenkopf Decl. ¶¶ 7-9.

¹⁰ MINOW & LAMAY at 62. Minow has been a CPD board member since the organization's founding after previously serving as co-chair of presidential debates for the League of Women Voters and a member of the Harvard debate study. *Id.* This exhibit, provided by Complainants, is an excerpt from his book on presidential debates, which provides a first-hand history of the formation of the CPD. In it, he and his co-author write:

1 then-chairmen of the Democratic and Republican National Committees, Paul G. Kirk Jr. and
2 Frank J. Fahrenkopf Jr., respectively, jointly called for the creation of the independent
3 Commission on Presidential Debates, which was incorporated on February 19, 1987.¹¹

4 Since its founding, CPD has staged almost every general election presidential debate,
5 including three presidential debates in the 2012 election cycle.¹² CPD purports to stage its
6 debates pursuant to the safe harbor provision of the Federal Election Campaign Act of 1971, as
7 amended (the "Act"), that exempts from the definition of "expenditure" any "nonpartisan activity
8 designed to encourage individuals to vote or to register to vote."¹³ Although the Act generally
9 prohibits corporations from making contributions to federal candidates,¹⁴ this exemption permits
10 501(c)(3) and 501(c)(4) organizations that do not "endorse, support, or oppose political
11 candidates or political parties" to stage candidate debates,¹⁵ provided the events abide by certain

The most persistent and difficult impediment to debates, anywhere, is that the candidate who is ahead in the polls — and particularly an incumbent — will almost never want to debate, and for good reason. . . . The leader's potential for gain is small, while the potential for the challenger is great. . . . But I thought the voters benefit from debates and so it was essential to find a way to bring pressure on the candidates to participate. The parties could do that.

Id. This conclusion followed Minow's experience co-chairing the League's 1980 presidential debates. That year, President Jimmy Carter had refused to participate in a debate hosted by the League after the organization invited both Republican nominee Ronald Reagan and independent candidate John B. Anderson. MINOW & LAMAY, *supra* note 7, at 56; Ridings Decl. ¶¶ 9-12, Tab A. With the hope of enticing Carter's participation, the League subsequently offered to host a two-way debate between Carter and Reagan if all three candidates agreed to participate in a three-way debate afterward. MINOW & LAMAY at 57, *supra* note 7, at 56; Ridings Decl. Tab A. Reagan refused and the plan was scrapped. Ultimately, after Anderson dropped below the League's 15 percent polling threshold, Carter and Reagan agreed to a two-way debate. MINOW & LAMAY, *supra* note 7, at 57; Ridings Decl. ¶ 11, Tab A.

¹¹ MINOW & LAMAY, *supra* note 7; Brown Decl., *supra* note 7, ¶ 11.

¹² 6869 Compl. Ex. 4 (CPD: *Our Mission*, COMM'N. ON PRESIDENTIAL DEBATES, <http://www.debates.org/index.php?page=about-cpd> (last visited Mar. 1, 2017)); 6942 Compl. Ex. 4 (same). CPD has also hosted every vice-presidential debate since 1988, including one in the 2012 election cycle. See CPD: *Our Mission*, COMM'N. ON PRESIDENTIAL DEBATES, <http://www.debates.org/index.php?page=about-cpd>.

¹³ 52 U.S.C. § 30101(9)(B)(ii).

¹⁴ 52 U.S.C. § 30118(a); see also 52 U.S.C. § 30116(f).

standards, including the use of "pre-established objective criteria" to determine which candidates may participate.¹⁶

On October 20, 2011, CPD adopted three criteria that candidates would be required to satisfy in order to participate in the 2012 general election debates. CPD required participants to: (1) satisfy the eligibility requirements for president under the U.S. Constitution; (2) qualify for enough state ballots to have a mathematical chance of securing an Electoral College majority; and (3) obtain the support of at least 15 percent of the national electorate "as determined by five selected national public opinion polling organizations, using the average of those organizations' most recent publicly-reported results at the time of determination."¹⁷ CPD applied the same participation criteria in 2000, 2004, 2008, and 2016.¹⁸

Applying these criteria to the 2012 candidate field, CPD determined that Democratic nominee President Barack Obama and Republican nominee Mitt Romney were eligible to participate in the three presidential debates.¹⁹ CPD also determined that Vice President Joe Biden

¹⁵ 11 C.F.R. § 110.13(a); Explanation and Justification, Funding and Sponsorship of Federal Candidate Debates, 44 Fed. Reg. 76,734 (Dec. 27, 1979) ("1979 E&J"); see also *Corporate and Labor Organization Activity: Express Advocacy and Coordination with Candidates*, 60 Fed. Reg. 64,260 (Dec. 14, 1995) ("1995 E&J").

¹⁶ 11 C.F.R. § 110.13(b), (c).

¹⁷ 6869 Compl. Ex. 8 (*CPD: 2012 Candidate Selection Criteria*, COMM'N. ON PRESIDENTIAL DEBATES, <http://www.debates.org/index.php?page=candidate-selection-process> (last visited March 1, 2017)) ("2012 Debate Criteria"); 6942 Compl. Ex. 8 (same).

¹⁸ 2012 Debate Criteria, *supra* note 17.

¹⁹ 6869 Compl. Exs. 9 (*2012 Application of Criteria*, COMM'N. ON PRESIDENTIAL DEBATES (Sept. 21, 2012), <http://www.debates.org/index.php?page=News,cntnt01,detail,0&cntnt01articleid=42&cntnt01origid=27&cntnt01detailtemplate=newspage&cntnt01returnid=80>), 11 (*2012 Application of Criteria – Second Presidential Debate*, COMM'N. ON PRESIDENTIAL DEBATES (Oct. 12, 2012), <http://www.debates.org/index.php?page=News,cntnt01,detail,0&cntnt01articleid=46&cntnt01origid=27&cntnt01detailtemplate=newspage&cntnt01returnid=80>), and 12 (*2012 Application of Criteria – Third Presidential Debate*, COMM'N. ON PRESIDENTIAL DEBATES (Oct. 19, 2012), <http://www.debates.org/index.php?page=News,cntnt01,detail,0&cntnt01articleid=47&cntnt01origid=27&cntnt01detailtemplate=newspage&cntnt01returnid=80>); 6942 Compl. Exs. 9 (same), 11 (same), and 12 (same).

and Representative Paul Ryan qualified for the vice presidential debate.²⁰ CPD concluded that no other candidates satisfied the criteria for inclusion in its 2012 debates.²¹

III. PROCEDURAL BACKGROUND

On September 11, 2014, Level the Playing Field, Inc. ("LPF") and Dr. Peter Ackerman filed the complaint in MUR 6869. The Complaint, which includes over 100 exhibits, makes two principal allegations. First, Complainants allege that CPD is a partisan organization that "endorses" and "supports" political candidates and political parties, *to wit*, the Democratic and Republican Parties and their respective presidential nominees.²² Broadly, Complainants provide three categories of information in support of this claim: (1) documents and statements from CPD officers and directors suggesting that CPD was formed as a partisan organization;²³ (2) information suggesting that CPD continues to promote the interests of the two major parties in the present day;²⁴ and (3) records of officers' and directors' connections and financial contributions to major party committees and candidates.²⁵ These exhibits, they argue,

²⁰ 6869 Compl. Ex. 9 (2012 *Application of Criteria*, COMM'N. ON PRESIDENTIAL DEBATES (Sept. 21, 2012), http://www.debates.org/index.php?page=news_detail&articleid=42&origid=27&returnid=80); 6942 Compl. Ex. 9 (same).

²¹ 6869 Compl. Exs. 9, 11, and 12, *supra* note 19; 6942 Compl. Exs. 9, 11, and 12, *supra* note 19.

²² 6869 Compl. at 14-32.

²³ *Id.* Exs. 20 (MINOW & LAMAY, *supra* note 7), 22 (Memorandum of Agreement on Presidential Candidate Joint Appearances (Nov. 26, 1985)) ("1985 MOU"), 23 (G.O.P. *Seeks a City for '88*, N.Y. TIMES (Jan. 26, 1986)), 24 (Press Release, News from the Democratic and Republican National Committees (Feb. 18, 1987)) ("1987 DNC/RNC Press Release"), 25 (Phil Gailey, *Democrats and Republicans Form Panel to Hold Presidential Debates*, N.Y. TIMES (Feb. 19, 1987)), and 32 (Excerpts from H. Comm. on H. Admin., *Presidential Debates: Hearing Before the Subcomm. On Elections of the H. Comm. on H. Admin.* at 50-51, 103d Cong., 1st Sess., June 17, 1993); see also LPF at *7.

²⁴ 6869 Supp. Compl. #2 Ex. A (Transcript, Frank Fahrenkopf Interview, SKY NEWS (Apr. 1, 2015)) ("Fahrenkopf Interview Transcript").

²⁵ 6869 Compl. Exs. 43 (Michael D. McCurry, PUBLIC STRATEGIES WASHINGTON INC., <http://www.psw-inc.com/team/member/michael-d.-mccurry>), 44 (Press Briefing by Mike McCurry, WHITE HOUSE (Sept. 23, 1996), available at <http://www.presidency.acsb.edu/ws/?pid=48827>), 45 (Harrison Wills, *Debate Commission's Own Hot Topic*, OPEN SECRETS (Oct. 2, 2012), <https://www.opensecrets.org/news/2012/10/debate-commission>), 46 (List of Frank Fahrenkopf Individual Contributions, FEC (retrieved Sept. 4, 2014)) ("List of Fahrenkopf Contributions"), 47 (Frank Fahrenkopf and Jim Nicholson, *Don't Repeat Error of Picking Steele*, POLITICO (Jan. 12, 2011, 4:37 a.m.),

1 demonstrate that CPD was formed by the Democratic and Republican Parties for partisan gain,²⁶
2 has consistently supported Democrats and Republicans to the exclusion of third party or
3 independent candidates,²⁷ and continues to be led by individuals with partisan interests.²⁸

4 Respondents deny the allegation. CPD and its leaders maintain that there is no evidence
5 the organization "endorses" or "supports" major party candidates or "opposes" independent
6 candidates, within any plain meaning of those terms.²⁹ The organization asserts that the
7 Complaint's information on CPD's formation and practices is not relevant, has been rejected by
8 the Commission and the courts, and has been taken out of context to create a "false narrative"
9 about CPD.³⁰ Further, the CPD's leadership asserts that the personal allegiances or actions of
10 officers and directors in their individual capacities are not evidence of CPD's *organizational*
11 endorsement of or support for the major parties.³¹ Respondents argue that to insist otherwise is
12 unconstitutional and practically unworkable.³²

<http://www.politico.com/news/stories/0111/47440.html>) ("Fahrenkopf Editorial"), 48 (2012 Two-Year Summary of American Gaming Association Political Action Committee, FEC (retrieved Sept. 4, 2014)), 49 (*What We Do*, PUBLIC STRATEGIES WASHINGTON INC., <http://www.psw-inc.com/what>), 53 (Andrea Saenz, *Former MALDEF Chief Antonia Hernandez Speaks at HLS*, HARV. L. RECORD (Nov. 16, 2007)), 54 (List of Howard Buffett Individual Contributions, FEC (retrieved Sept. 4, 2014) ("List of Buffett Contributions"), 55 (List of Dorothy Ridings Individual Contributions, FEC (retrieved Sept. 4, 2014) ("List of Ridings Contributions"), 56 (*CPD Elects Six New Directors*, COMM'N. PRESIDENTIAL DEBATES (Apr. 16, 2014), <http://www.debates.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=52&cntnt01origid=15&cntnt01detailtemplate=newspage&cntnt01returnid=80>), 60 (Jonathan D. Salant, *Former Democratic Party Leader Paul Kirk Backs Obama*, BLOOMBERG (May 2, 2008 2:22 p.m.), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aBtdfyDJewZM&refer=home>), and 61 (Abby Goodnough & Carl Hulse, *Former Kennedy Aide Is Appointed to Fill His Senate Seat*, N.Y. TIMES (Sept. 24, 2009)).

²⁶ 6869 Compl. at 16-20.

²⁷ *Id.* at 20-25; 6869 Supp. Compl. #2 at 1-4.

²⁸ 6869 Compl. at 25-32.

²⁹ 6869 CPD Resp. at 4; CPD Dir. Resp. at 2.

³⁰ CPD Dir. Resp. at 2-8.

³¹ 6869 CPD Resp. at 4-5; CPD Dir. Resp. at 6.

³² CPD Dir. Resp. at 6-7.

1 Second, the Complaint contends that the CPD's 15 percent threshold is not an "objective
2 criterion," but rather designed to ensure the participation of Republican and Democratic
3 nominees to the exclusion of virtually all independent candidates.³³ In support, Complainants
4 primarily offer two expert reports from Dr. Clifford Young and Douglas Schoen, respectively.
5 Young concludes that, in order to meet CPD's 15 percent polling threshold, candidates must
6 obtain name recognition among 60-80 percent of the electorate.³⁴ Young also opines that the
7 type of polling relied upon by CPD systematically disfavors independent candidates due to
8 increased inaccuracy in three-way races. Following on Young's conclusions, Schoen submits
9 that, in order to obtain 60-80 percent name recognition, an independent candidate must raise over
10 \$266 million, including almost \$120 million for paid media content production and
11 dissemination.³⁵ Complainants argue that these requirements are prohibitively high for
12 independent candidates who do not enjoy the same exposure and resources of major party
13 candidates. On this basis, the Complaint concludes that CPD's 15 percent threshold is so high
14 that only major party candidates could reach it and therefore not an objective means of selecting
15 debate participants.³⁶

16 Respondents also deny this allegation. CPD argues that Commission regulations afford
17 debate sponsors broad discretion to determine participant selection criteria and point out that the
18 Commission and the courts have affirmed the 15 percent threshold as an objective condition.³⁷
19 Noting that the 15 percent threshold was originally a requirement of CPD's predecessor in debate

³³ 6869 Compl. at 32-47.

³⁴ *Id.* Ex. 62 (Expert Report of Dr. Clifford Young) ("Young Report").

³⁵ *Id.* Ex. 70 (Expert Report of Douglas Schoen) ("Schoen Report").

³⁶ *Id.* at 37-38.

³⁷ 6869 CPD Resp. at 7-11; CPD Dir. Resp. at 9.

1 sponsorship, the League of Women Voters,³⁸ Respondents contend that the polling threshold
2 provides an objective means of achieving its educational mission. Specifically, the organization
3 argues that the 15 percent threshold:

4 best balanced the goal of being sufficiently inclusive to invite those
5 candidates considered to be among the leading candidates, without
6 being so inclusive that invitations would be extended to candidates
7 with only modest levels of public support, thereby creating an
8 unacceptable risk that leading candidates with the highest levels of
9 public support would refuse to participate.³⁹

10 Likewise, the limiting criterion also ensures that debate itself is not "hindered by the sheer
11 number of speakers."⁴⁰ Respondents also argue that the allegations about potential manipulation
12 of polling data are speculative and unfounded.⁴¹

13 The Complaint concludes that the Respondents' alleged noncompliance with the debate
14 sponsorship regulations resulted in corporate contributions to and expenditures on behalf of
15 debate participants in violation of 52 U.S.C. § 30118(a). In addition, the Complaint alleges that
16 because CPD had a "major purpose" of promoting the election of the Democratic and Republican
17 Party nominees in 2012 and made expenditures in excess of \$1,000 during the calendar year,
18 CPD qualified as a "political committee" under the Act. Accordingly, the Complaint asserts that
19 CPD violated 52 U.S.C. §§ 30103 and 30104 by failing to register and report with the FEC as a
20 political committee and that CPD, its co-chairs, and ten officers and directors violated 52 U.S.C.
21 § 30116(f) by accepting contributions from corporate sponsors.

³⁸ 6869 CPD Resp. at 9; *see also* Ridings Decl., *supra* note 7, ¶ 9, Tab A.

³⁹ Brown Decl., *supra* note 7, ¶ 32; CPD Dir. Resp. at 9-13.

⁴⁰ CPD Resp. at 11.

⁴¹ CPD Resp. at 7-11; CPD Dir. Resp. at 13-17.

1 Submissions filed by the Green Party of the United States ("Green Party") and the
2 Libertarian National Committee ("LNC") on June 15 and 18, 2015, incorporated the allegations
3 of MUR 6869 into a new matter designated by the Commission as MUR 6942.⁴²

4 On July 13, 2015 and December 10, 2015, the Commission voted on MURs 6869 and
5 6942, respectively. Relying on the Commission's dismissal of nine previous similar matters
6 alleging that CPD is partisan and uses subjective participation criteria, this Office recommended
7 that the Commission find no reason to believe Respondents had violated the Act's prohibition on
8 corporate contributions or political committee registration and reporting requirements in both
9 matters.⁴³ The Commission adopted these recommendations, deciding each case by a vote of 5-0
10 (with one commissioner recused).⁴⁴ The Commission voted to approve Factual & Legal
11 Analyses with identical legal reasoning and to close each file.⁴⁵

12 LPF and the other Complainants challenged the Commission's decisions in federal
13 district court under 52 U.S.C. § 30109(a)(8). The district court concluded that the Commission
14 had acted arbitrarily and capriciously and contrary to law by: (1) failing to articulate the standard
15 it used to determine whether CPD had endorsed, supported, or opposed political candidates or
16 parties under 11 C.F.R. § 110.13(a); (2) not demonstrating its consideration of the evidence
17 before it, particularly that relating to alleged partisanship and political donations by CPD's
18 officers and directors and two expert analyses on polling and fundraising; (3) failing to notify

⁴² The original Complaint in MUR 6942 was a copy of the Complaint in MUR 6869 and asserted no additional allegations; however, on October 13, 2015, the 6942 Complainants submitted supplemental material on the reliability of polling data, 6942 Supp. Compl., and Respondents were afforded an opportunity to respond, see 6942 Supp. CPD Resp.

⁴³ First General Counsel's Report, MUR 6869 (June 17, 2015); First General Counsel's Report, MUR 6942 (Dec. 1, 2015).

⁴⁴ Certification, MUR 6869 (July 13, 2015); Certification, MUR 6942 (Dec. 10, 2015).

⁴⁵ Certification, MUR 6869 (July 13, 2015); Certification, MUR 6942 (Dec. 10, 2015).

1 and solicit responses from ten respondents; and (4) concluding that CPD's 15 percent polling
2 criteria is objective under 11 C.F.R. § 110.13(c) without adequately discussing the plaintiffs'
3 evidence and arguments or providing a legal analysis applying the regulation to the evidence and
4 arguments.⁴⁶ On these bases, the court granted the plaintiff's motion for summary judgment and
5 ordered the Commission to reconsider the evidence and allegations and issue a new reason-to-
6 believe decision in these matters within 30 days.⁴⁷

7 **IV. LEGAL ANALYSIS**

8 **A. CPD Qualifies as a Staging Organization that Does Not Endorse, Support, or**
9 **Oppose Political Candidates or Political Parties**

10 The Act prohibits any corporation from making contributions or expenditures in
11 connection with an election.⁴⁸ Likewise, the Act bars political committees from knowingly
12 accepting corporate contributions.⁴⁹ "Contribution" includes "any gift, subscription, loan,
13 advance, or deposit of money or anything of value"⁵⁰ and "expenditure" includes "any purchase,
14 payment, distribution, loan, advance, deposit, or gift of money or anything of value,"⁵¹ but
15 exempts "nonpartisan activity designed to encourage individuals to vote or to register to vote."⁵²

16 Pursuant to this exemption, the Commission has promulgated rules permitting
17 "[n]onprofit organizations described in 26 U.S.C. § 501(c)(3) or 501(c)(4) and which do not

⁴⁶ *LPF* at *6, *8, *9, and *11. The court also found that the Commission had acted arbitrarily and capriciously by deciding not to initiate a rulemaking on whether to revise and amend 11 C.F.R. § 110.13(c), which the plaintiffs had challenged at the same time. *Id.* at *13.

⁴⁷ *LPF* at *11. On February 10, 2017, the court granted the Commission an additional 30 days to make a reason to believe determination in these matters. *Level the Playing Field v. FEC*, No. 1:15-cv-01397, slip op. at 3 (Feb. 10, 2017).

⁴⁸ 52 U.S.C. § 30118(a).

⁴⁹ *Id.* § 30116(f); 30118(a).

⁵⁰ *Id.* § 30101(8)(A).

⁵¹ *Id.* § 30101(9)(A)(i).

⁵² *Id.* § 30101(9)(B)(ii).

1 endorse, support or oppose political candidates or political parties" to stage candidate debates in
2 accordance with 11 C.F.R. §§ 110.13 and 114.4(f).⁵³ The purpose of this rule was to "provide a
3 specific exception so that certain nonprofit organizations and the news media may stage debates,
4 without being deemed to have made prohibited corporate contributions to the candidates taking
5 part in the debate."⁵⁴

6 As noted by the *LPF* court, neither the Act nor Commission regulations define what it
7 means for a debate sponsor to "endorse, support, or oppose" candidates or parties.⁵⁵ However,
8 the meaning of this standard is plain on its face.⁵⁶ And indeed, in reviewing the Act's use of
9 "support" and "oppose" in another context, the United States Supreme Court found that "[t]hese
10 words provide explicit standards for those who apply them and give the person of ordinary
11 intelligence a reasonable opportunity to know what is prohibited."⁵⁷

12 Therefore, applying the plain meaning of these words, we must evaluate whether
13 Complainants' evidence on the formation and evolution of CPD and on the alleged partisanship
14 of CPD officers and directors either demonstrates directly or supports a reasonable inference that

⁵³ 11 C.F.R. § 110.13(a)(1); 1979 E&J, *supra* note 15.

⁵⁴ 1995 E&J, *supra* note 15, at 64,261.

⁵⁵ In response to specific allegations that CPD was "controlled by" the two major parties and that the parties "had input in" or were "involved in" CPD's operations and debate decisions, the court in *Buchanan v. FEC*, 112 F. Supp. 2d 58 (D.D.C. 2000), concluded that CPD did not "endorse, support, or oppose" candidates or parties, 112 F. Supp. 2d at 71 n.8.; however, such a standard is inapplicable here where no such allegations have been offered. *LPF* at *6 ("[U]nlike in *Buchanan*, there are no control-specific factual allegations here to warrant applying a control standard.").

⁵⁶ See *LPF* at *12, n. 6 ("According to the Oxford Dictionary, 'endorse' means to 'declare one's approval of'; 'support' means 'contributing to the success of or maintaining the value of'; and 'oppose' means to 'set oneself against' or 'stand in the way of.'").

⁵⁷ *McConnell v. FEC*, 540 U.S. 93, n. 64 (2003) (rejecting a challenge to the meaning of the words "promote, attack, support, or oppose" as used in the definition of "federal election activity" in 52 U.S.C. § 30101(20)(A)(iii) (then 2 U.S.C. § 431(20)(A)(iii)); see also, e.g., Factual & Legal Analysis, MUR 6072 at 5 (Northland Regional Chamber of Commerce) (Apr. 27, 2009) (applying "endorse, support, or oppose").

1 the CPD has endorsed or supported the Democratic and Republican Parties and their respective
2 presidential nominees (or opposed third parties or independent candidates).

3 1. Documents and Statements from CPD Officers and Directors Allegedly
4 Suggesting that CPD Was Formed as a Partisan Organization

5 Complainants first allege that information from the time of CPD's founding in 1987
6 indicates that CPD had bipartisan (rather than *nonpartisan*) origins and therefore was formed
7 with the intent to endorse or support the Democratic and Republican Parties and their respective
8 nominees. Among the documents presented in support of this allegation are a 1985
9 Memorandum of Understanding⁵⁸ ("1985 MOU") and a 1987 joint press release from the then-
10 chairmen of the Democratic National Committee ("DNC") and Republican National Committee
11 ("RNC"), Frank Fahrenkopf Jr. and Paul Kirk, respectively, who subsequently became the first
12 co-chairs of CPD.⁵⁹ The 1985 MOU addresses the necessity of institutionalized debates and
13 describes their "bipartisan view" on the need for "joint appearances" of the presidential and vice-
14 presidential nominees of the "two major political parties."⁶⁰ Similarly, the press release, which
15 announces the formation of the CPD, describes the organization as a "bipartisan" entity "formed
16 to implement joint sponsorship of general election presidential and vice presidential debates...by
17 the national Republican and Democratic committees between their respective nominees."⁶¹

18 The Complaints also submit various past statements from CPD officers and directors
19 reportedly indicating CPD's support for the major parties and opposition to independent
20 candidates,⁶² including a news article describing Fahrenkopf's reported sentiment that CPD "was

⁵⁸ 1985 MOU, *supra* note 23.

⁵⁹ 1987 DNC/RNC Press Release, *supra* note 23.

⁶⁰ 1985 MOU, *supra* note 23.

⁶¹ 1987 DNC/RNC Press Release, *supra* note 23.

⁶² 6869 Compl. at 18-19; *see also* LPF at *7.

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1 not likely to look with favor on including third-party candidates in the debates” and another from
2 Kirk that “he personally believed the panel should exclude third-party candidates, [but] could not
3 speak for the commission.”⁶³

4 As noted by the *LPF* court in its recent decision, this information is “identical to evidence
5 submitted with prior CPD-related complaints, including MURs 4987, 5004, and 5021. Those
6 matters, which pertained to CPD’s sponsorship of the 2000 general election presidential debates,
7 were reviewed by the court in *Buchanan* [*v. FEC*, 112 F. Supp. 2d 58 (D.D.C. 2000)].”⁶⁴ In
8 *Buchanan*, the court upheld the Commission’s conclusion that such information does not provide
9 a reason to believe the CPD endorses or supports political candidates or parties.⁶⁵ The *Buchanan*
10 court deferred to the Commission, writing “it is apparent from the report that in the absence of
11 any contemporaneous evidence of influence by the major parties over the 2000 debate criteria,”
12 “evidence of possible past influence [was] simply insufficient to justify disbelieving the CPD’s
13 sworn statement . . . that the CPD’s 2000 debate criteria were neither influenced by the two
14 major parties nor designed to keep minor parties out of the debates.”⁶⁶ Four years later, in 2004,
15 the Commission further emphasized that the increasing age of these documents and statements
16 undermines their persuasiveness as evidence of current bias.⁶⁷ Evaluating the statements in the
17 present matters, we reach a similar conclusion.

⁶³ 6869 Compl. Ex. 25 (*G.O.P. Seeks a City for '88*, N.Y. TIMES (Jan. 26, 1986)); 6942 Compl., Ex. 25 (same).

⁶⁴ *LPF* at *7.

⁶⁵ *Buchanan*, 112 F. Supp. 2d at 72.

⁶⁶ *Id.* at 72-73.

⁶⁷ First General Counsel's Report, MUR 5414 (Dec. 7, 2004) (“Not only did challenges based on Fahrenkopf’s and Kirk’s leadership of the CPD not carry the day when they were fresh [in MURs 4987, 5004, and 5021], but as neither man has been a party official since 1989, the passage of time has rendered such assertions less persuasive.”); see also Certification, MUR 5414 (Dec. 13, 2004) (finding no reason to believe CPD violated 52 U.S.C. § 30118(a)—then 2 U.S.C. § 441b(a)—without approving a separate Factual & Legal Analysis, consistent with Commission policy at the time in cases finding no reason to believe a violation occurred).

At the outset, it is not clear that, in context, these documents and past statements constitute an endorsement of, or support for, the Democratic and Republican Parties and their candidates or opposition to independent candidates. In a recently submitted declaration, Fahrenkopf insists that these "cherry-picked quotes" must be understood as reflections on the greater goal of ensuring debates as a permanent part of the political process:

When the CPD was formed, the goal was to institutionalize general election televised debates for the good of the public, and the major impediment to achieving that goal was securing the commitment of both major party nominees to debate. References to the CPD as bipartisan at the time of its formation must be understood with reference to this challenge and the huge stride forward that forming the CPD represented.⁶⁸

Declarations from others similarly insist that statements attributed to them do not fairly or fully reflect their respective views on the participation of independent candidates in CPD debates.⁶⁹ For example, Barbara Vucanovich, a CPD board member between 1987 and 1997 who was quoted as praising CPD's executive director for being "extremely careful to be bi-partisan" clarifies that she "used the word 'bi-partisan,' as many do, to mean not favoring any one party over another."⁷⁰ Vucanovich and others have previously affirmed their view that "CPD's debates should include the leading candidates for president and vice-president, regardless of party affiliation" but "should not include candidates who have only marginal national electoral support."⁷¹

⁶⁸ Supp. Fahrenkopf Decl., *supra* note 7, ¶10.

⁶⁹ CPD Dir. Resp. Ex. 3 (re-submitting sworn declarations from current and former CPD board members Alan K. Simpson, Newton Minow, Barbara Vucanovich, John Lewis, and David Norcross previously submitted in MUR 5414) ("MUR 5414 Declarations").

⁷⁰ CPD Dir. Resp. Ex. 3 (Declaration of Barbara Vucanovich).

⁷¹ MUR 5414 Declarations, *supra* note 70.

1 Assuming *arguendo* that such statements do suggest support for debates exclusively
2 between Republicans and Democrats or opposition to the inclusion of independent candidates,
3 they do not necessarily reflect the organization's perspective at the time it sponsored the 2012
4 presidential debates at issue. Organizations may change over time.⁷² And given this, it would be
5 inappropriate to rely on documents and statements that are more than 30 years old to ascertain
6 CPD's present support or opposition to candidates and parties. Indeed, there are significant
7 indications that CPD has made concerted efforts to be independent in recent years and reaffirm
8 its commitment to an educational mission. For example, according to Janet Brown, Executive
9 Director of CPD, the organization conducts a review after every presidential election of issues
10 relating to the debates.⁷³ After its study of the 1996 debates — which some alleged had
11 arbitrarily excluded independent candidate Ross Perot — CPD adopted new candidate selection
12 criteria and retained a polling consultant to ensure its "careful and thoughtful application."⁷⁴
13 CPD believed the new criteria would be "faithful to the long-stated goal of the CPD's debates —
14 to bring before the American people, in a debate, the leading candidates for the Presidency and
15 Vice Presidency."⁷⁵ Brown affirms that these criteria "were not adopted with any partisan (or
16 bipartisan) purpose" or "with the intent to keep any party or candidate from participating...."⁷⁶
17 Declarations from current and recent CPD directors similarly affirm the organization's recent
18 commitment to including "any independent or non-major party candidate if that candidate is

⁷² See *Citizens for Responsibility and Ethics in Washington v. FEC*, No. 1:14-cv-01419, slip op. at *11 (D.D.C. Sept. 19, 2016).

⁷³ Brown Decl., *supra* note 7, ¶ 29.

⁷⁴ *Id.* ¶ 30, 34-35.

⁷⁵ *Id.* ¶ 30.

⁷⁶ *Id.* ¶ 31.

1 properly considered a leading candidate.”⁷⁷ In the same sworn affidavits, each director swears
2 that he or she has “never observed any [CPD] Board member ever approach any issue
3 concerning the CPD or its mission from a partisan perspective and the CPD has conducted its
4 business in a strictly nonpartisan fashion.”⁷⁸ Thus, we believe the early documents and
5 statements are of limited persuasive value in evaluating CPD’s recent support for or opposition
6 to political parties or candidates.

7 Finally, even if these written and oral statements did reflect more current sentiments, they
8 are not indicative of CPD’s *organizational* endorsement of or support for the Democratic and
9 Republican Parties and their candidates, or CPD’s opposition to third party candidates. The 1985
10 MOU and 1987 press release were each executed by the DNC and RNC — not the CPD itself —
11 as expressions of those organizations’ commitment to a new custom for presidential debates.
12 Indeed, according to both the Georgetown and Harvard studies on presidential debates, such
13 support was critical to the success of institutionalized debates among the leading candidates for
14 president.⁷⁹ Likewise, there is no indication that the statements from officers and directors were
15 made in their official capacity as representatives of CPD. In fact, in his reported statement to the
16 *New York Times* expressing opposition to independent candidates in the debates, Kirk explicitly
17 distinguished between his own feelings and the organization’s position, noting that “he
18 personally believed the panel should exclude third-party candidates, [but] *could not speak for the*
19 *commission*.”⁸⁰ The Commission has repeatedly concluded that individuals may wear “multiple

⁷⁷ CPD Dir. Resp. Ex. 6 (submitting sworn declarations from Michael D. McCurry, Howard G. Buffet, John C. Danforth, John Griffen, Antonia Hernandez, John I. Jenkins, Newton Minow, Richard Parsons, and Alan K. Simpson) (“CPD Dir. Declarations”).

⁷⁸ *Id.*

⁷⁹ See MINOW & LAMAY, *supra* note 7.

⁸⁰ 6869 Compl. Ex. 25 (*G.O.P. Seeks a City for '88*, N.Y. TIMES (Jan. 26, 1986) (emphasis added)); 6942 Compl. Ex. 25 (same).

hats" to represent the interests of multiple people or entities at different times.⁸¹ Thus, the historical documents and statements do not indicate the CPD's organizational support for any candidate or party or opposition to others.

2. Recent Statements by Fahrenkopf in His Official Capacity as Co-Chair of CPD

In an attempt to buttress its claim that CPD endorses, supports, or opposes candidates or parties, the MUR 6869 Complainants supplemented their submission with excerpts from a 2015 interview Fahrenkopf gave to Sky News.⁸² In the interview, Fahrenkopf stated that CPD has "a system," "we . . . primarily go with the two leading candidates, it's been the two political party candidates . . . except for 1992 when Ross Perot participated in the debates."⁸³ The Complainants argue that this is an "admission" from Fahrenkopf, in his official capacity representing CPD, that CPD systematically supports major party candidates over independent candidates.⁸⁴

Complainants' interpretation is not dispositive, however. Fahrenkopf's statement indicates no categorical support for Democrats or Republicans or opposition to independent candidates, stating clearly that CPD "*primarily go[es]* with the two *leading* candidates," while immediately indicating the exceptions to that trend. Moreover, as Fahrenkopf averred in a declaration responding to this allegation,⁸⁵ the statement appears to be more an assertion of historical fact than an admission that CPD favors candidates from the two major political parties

⁸¹ See, e.g., Advisory Op. 2005-02 (Corzine); Advisory Op. 2003-10 (Reid); see also RESTATEMENT (SECOND) OF AGENCY 13 ("merely acting in a manner that benefits another is not necessarily acting on behalf of that person") (cited with approval in *Definitions of "Agent" for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures*, 71 Fed. Reg. 4975, 4979 (Jan. 31, 2006)).

⁸² Fahrenkopf Interview Transcript, *supra* note 25.

⁸³ *Id.*

⁸⁴ 6869 Supp. Compl. #2 at 1-2.

⁸⁵ 6869 Supp. Resp. Ex. A (Fahrenkopf Decl.) ("Fahrenkopf Decl.").

1 over others.⁸⁶ Furthermore, Fahrenkopf makes his statement in the context of a broader point
2 about the impact of multiple candidates (the questioner posited seven) on the educational value
3 of debates.⁸⁷ Thus, Fahrenkopf's interview is consistent with Respondents' repeated attestations
4 that CPD operates for the purpose of providing meaningful debates for the public benefit.
5 Accordingly, we do not believe these statements are persuasive indicators that CPD endorses,
6 supports, or opposes political candidates or parties.

7 3. Exhibits Regarding Alleged Partisanship and Political Activity of CPD Co-
8 Chairs and Board Members

9 The Complaints have supplemented the information presented in past matters with new
10 information alleging more recent partisanship and political activity by CPD's co-chairs and
11 directors. Notably, the Complaints identify the recent personal contributions of Fahrenkopf,
12 McCurry, and several other directors to various candidates and political committees.⁸⁸ The
13 Complaints also submit a 2011 op-ed by Fahrenkopf indicating a personal allegiance to the
14 Republican Party and information on board members' "ties" to officeholders and political
15 parties, including former employment. Finally, the Complaints attach information on Fahrenkopf
16 and McCurry's work as lobbyists on behalf of various corporations and trade associations that
17 are allegedly "heavily invested in currying favor with the two major political parties."⁸⁹

18 The Complainants urge the Commission to infer that individuals' statements, recent
19 contributions, and outside employment render the CPD itself a partisan organization. As noted

⁸⁶ Fahrenkopf Decl., *supra* note 85, ¶ 4.

⁸⁷ The Sky News interviewer states "... we've ended up with a seven person, a seven party debate. What do you think the prospects for that are?" to which Fahrenkopf responds with a description of the crowded 2012 Republican primary debates stating "people jokingly say it's less of debate than a cattle show, because there's such little time for each candidate to get across in the short period what their views are on issues." Fahrenkopf Interview Transcript, *supra* note 24. Fahrenkopf continued, "seven people on the stage at one time is very difficult, it's going to take a very clever moderator to make sure that each candidate gets an opportunity to put forth their view. *Id.*

⁸⁸ See *supra* note 25.

⁸⁹ 6869 Compl. at 27-28.

1 above, however, the Commission has previously opined that individuals may wear "multiple
2 hats" to represent multiple interests.⁹⁰ It follows then, that an individual's leadership role in a
3 given organization does not restrict his or her ability to speak freely on political issues or make
4 contributions to political committees when he or she does so in his or her personal capacity.⁹¹
5 Thus, we believe it would be inappropriate to impute an individual's statements or conduct to
6 CPD unless there were some indication that he or she was acting in his or her official capacity as
7 an officer or director, or otherwise on behalf of, CPD at the time, or that CPD adopted the
8 individual's statements or conduct.

9 Here, there is no indication that Fahrenkopf wrote his op-ed in his official capacity as
10 CPD co-chair, nor does the opinion piece express positions on behalf of CPD. Likewise, the
11 Complaints make no suggestion that any of the contributions by Fahrenkopf, McCurry, or CPD
12 board members originated from CPD resources or any source other than their respective personal
13 assets. Finally, the available information does not show that Fahrenkopf, McCurry, or other CPD
14 officers and directors have acted as agents of CPD in the course of outside employment. At the
15 outset, most of the information presented involves work that preceded — at times significantly

⁹⁰ See, e.g., Advisory Op. 2007-05 (Iverson) (opining that an individual may serve as chairman of a state party committee and solicit, direct, and spend non-federal funds on its behalf while continuing to serve as chief of staff to a member of Congress); Advisory Op. 2005-02 (Corzine) (describing circumstances under which a U.S. Senator may raise non-federal funds for his state gubernatorial campaign and other state candidates and committees); Advisory Op. 2003-10 (Reid) (concluding, *inter alia*, that an individual may, at different times, act in his capacity as an agent on behalf of a state party and in his capacity as an agent on behalf of a U.S. Senator); see also RESTATEMENT (SECOND) OF AGENCY 13 ("merely acting in a manner that benefits another is not necessarily acting on behalf of that person") (cited with approval in *Definitions of "Agent" for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures*, 71 Fed. Reg. 4975, 4979 (Jan. 31, 2006)); see also *Compliance Guide for 501(c)(3) Public Charities* at 5, Pub. 4221-PC., IRS ("the political campaign activity prohibition [on 501(c)(3) organizations] is not intended to restrict free expression on political matters by leaders of [501(c)(3) organizations] speaking for themselves as individuals.").

⁹¹ See Advisory Op. 1984-12 (American College of Allergists) (recognizing the ability of organization leaders, acting in their individual capacities, to establish and govern a separate entity).

1 — the individual's service for CPD.⁹² And, to the extent officers or directors are currently
2 employed by entities with ties to or interests in the success of the Democratic or Republican
3 parties, there is no indication that they act on behalf of CPD in the course of such employment,
4 or alternatively, on behalf of their employer while volunteering for CPD. Moreover, the
5 organization has recently adopted a formal "Political Activities Policy" that is "intended to deter
6 CPD-affiliated persons from participating, even in a personal capacity, in the political process at
7 the presidential level (including the making of campaign contributions) while serving on the
8 Board."⁹³ Although not part of Respondents' submissions, the policy reportedly builds on a
9 previous "informal policy against Board members serving in any official capacity with a
10 campaign while also serving on the CPD Board" and "reflects CPD's view that a debate staging
11 organization better serves the public when it not only conducts its operations in a strictly
12 nonpartisan manner, but when it also adopts and adheres to balanced policies designed to prevent
13 even the potential for an erroneous appearance of partisanship."⁹⁴ The Political Activities Policy
14 supplements CPD's Conflict of Interest Policy, which would appear to limit financial conflicts of
15 interest that could arise as a result of outside employment.⁹⁵ Complainants' information alleging
16 partisan political activity on the part of CPD's officers and directors *in their non-CPD capacities*
17 therefore does not support a reasonable inference that CPD endorses supports or opposes

⁹² For example, the Complaint notes that Brown "is a creature of partisan politics, having served as an aide to top Republicans before taking over her present office [as Executive Director of CPD] in 1987." 6869 Compl. at 28 (emphasis added). The Complainants likewise note that board member Newton Minow was a "close aide to Adlai Stevenson and a Kennedy appointee to the Federal Communications Commission" and that board member Antonia Hernandez served as counsel to the Senate Judiciary Committee when it was led by the late Ted Kennedy. *Id.*

⁹³ Supp. Brown Decl., *supra* note 5, ¶ 7.

⁹⁴ *Id.*

⁹⁵ 6869 Compl. Ex. 101 (Conflict of Interest Policy, COMM'N. PRESIDENTIAL DEBATES); 6942 Compl. Ex. 101 (same).

1 political candidates or parties. For the reasons stated above, the inference that LPF asks the
2 Commission to draw is legally baseless and factually unworkable.

3 The Complaints offer no additional information to demonstrate that CPD itself has
4 endorsed, supported, or opposed any political party or political candidate. Accordingly, CPD
5 would appear to be a permissible debate sponsor under 11 C.F.R. § 110.13(a).

6 **B. CPD's 15 Percent Threshold Constitutes an Objective Criterion**

7 Commission regulations require staging organizations like CPD to use "pre-established
8 objective criteria to determine which candidates may participate in a debate."⁹⁶ In adopting this
9 requirement, the Commission reasoned, "[g]iven that the rules permit corporate funding of
10 candidate debates, it is appropriate that staging organizations use pre-established objective
11 criteria to avoid the real or apparent potential for a *quid pro quo*, and to ensure the integrity and
12 fairness of the process."⁹⁷

13 The regulation does not define "objective criteria;" however, the courts have said it does
14 not "mandate[] a single set of objective criteria all staging organization must follow, but rather
15 [gives] the individual organizations leeway to decide what specific criteria to use."⁹⁸ The
16 *Buchanan* court concluded that "[t]he authority to determine what the term objective criteria
17 means rests with the agency . . . and to a lesser extent with the courts that review agency
18 action."⁹⁹ To that end, the Commission has previously made clear that a requirement of
19 "reasonableness is implied" and stated that "[s]taging organizations must be able to show that

⁹⁶ 11 C.F.R. § 110.13(c). The Complainants do not question whether the debate criteria is "pre-established," therefore we will not address this requirement further.

⁹⁷ 1995 E&J, *supra* note 15, at 64,262.

⁹⁸ *Buchanan*, 112 F. Supp. 2d at 73 (citations and internal quotations omitted); *see also* 1995 E&J, *supra* note 15 at 64,262 ("The choice of which objective criteria to use is largely left to the discretion of the staging organization.").

⁹⁹ *Buchanan*, 112 F. Supp. 2d at 73.

1 their objective criteria were used to pick the participants, and that the criteria were not designed
2 to result in the selection of certain pre-chosen participants.”¹⁰⁰

3 In specifically considering — and upholding — CPD’s 15 percent threshold as applied to
4 the 2000 debates, the *Buchanan* court opined that “the objectivity requirement precludes debate
5 sponsors from selecting a level of support so high that only the Democratic and Republican
6 nominees could reasonably achieve it.” But the court also noted that several third party
7 candidates *have* achieved over 15 percent support in polls at or around the time that the debates
8 are traditionally held:

9 For instance, by September 1968, George Wallace had achieved a
10 level of support of approximately 20% in the polls. John Anderson
11 was invited by the League of Women Voters to participate in the
12 1980 presidential debates after his support level reached
13 approximately 15%. Finally, in 1992, Ross Perot's standing in the
14 polls was near 40% at some points and he ultimately received
15 18.7% of the popular vote that year.¹⁰¹

16 Accordingly, the court concluded that “third party candidates have proven that they can achieve
17 the level of support required by the CPD.”¹⁰² The Complainants now present new information in
18 support of their contention that the 15 percent threshold is not objective and results in prohibited
19 corporate contributions from CPD to debate participants.

20 1. Expert Reports on the Purported Impracticability of Independent Candidates
21 Reaching CPD’s 15% Polling Threshold

22 Complainants present two expert reports in support of their argument that the 15 percent
23 threshold is designed to result in the exclusion of all candidates but those nominated by the
24 Democratic and Republican Parties. The first, by Dr. Clifford Young, opines that in order to

¹⁰⁰ 1995 E&J, *supra* note 15, at 64,262.

¹⁰¹ *Buchanan*, 112 F. Supp. 2d at 73.

¹⁰² *Id.*

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1 obtain 15 percent of the vote share, a candidate must achieve name recognition among at least 60
2 percent of the population and perhaps as much as 80 percent.¹⁰³ The second, from political
3 analyst Douglas Schoen, estimates that the cost to an independent candidate of achieving 60
4 percent name recognition would be over \$266 million, including almost \$120 million for paid
5 media content production and dissemination.¹⁰⁴ The Complainants argue that such a sum is
6 prohibitive for independent and third-party candidates, who do not have the benefit of
7 participating in a much-watched primary season or of garnering a minimum vote share in a
8 general election by virtue of being associated with a major party.¹⁰⁵ Thus, Complainants
9 conclude, the 15 percent threshold is systematically out of reach for independent candidates and
10 therefore not "objective" within the meaning of the regulations.

11 The expert reports relied upon by Complainants contain significant limitations that
12 undermine their persuasiveness. Young's analysis is limited in its scope: It correlates polling
13 results to name recognition alone and draws conclusions regarding hypothetical third-party-
14 candidate performance based on that one factor. But polling results are not merely a function of
15 name recognition — they are a much more complex confluence of factors. Indeed, as Young
16 acknowledges, his report does not take into account a number of other factors that may affect
17 polling results, including "fundraising, candidate positioning, election results, and idiosyncratic
18 events."¹⁰⁶ In so doing, the report minimizes the very salient fact that, no matter how
19 recognizable a candidate is, the candidate may, nonetheless, be unpopular. For example, the

¹⁰³ See generally Young Report, *supra* note 34.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 12-13 (discussing the "party halo effect").

¹⁰⁶ *Id.* at 12-13; see also, e.g., Nate Silver, *A Polling Based Forecast of the Republican Primary Field*, FIVETHIRTYEIGHT POLITICS (May 11, 2011) (noting that, more than name recognition, "laying the groundwork for a run quite early on," including efforts to "hire staff, cultivate early support, brush up [] media skills" predicts later electoral success).

1 report does not take into consideration forces that might decrease the poll numbers of an
2 independent candidate who has become well-recognized — such as policy preferences or
3 political missteps. Conversely, it also does not account for forces that might increase the poll
4 numbers of an otherwise unfamiliar independent candidate — such as high unfavorable ratings
5 among major party candidates. This is a significant limitation that undermines the practical
6 application of the data to our analysis of CPD's debate participation criterion.

7 In addition, the Complaint appears to draw misguided conclusions from the Young
8 Report's data. Notably, neither the Young Report nor the Complaints and their voluminous
9 exhibits ever establish that independent candidates do not or cannot meet 60-80 percent name
10 recognition. To the contrary, during the 2016 presidential election, a YouGov poll taken at the
11 end of August found that 63 percent of registered voters had heard of Libertarian Gary Johnson
12 and 59 percent had heard of Green Party candidate Jill Stein.¹⁰⁷ Thus, there is no information in
13 the record to show that 60-80 percent name recognition is a prohibitively high bar for
14 independent candidates to meet or, put another way, that a criteria which purportedly requires
15 achievement of 60-80 percent name recognition is designed to exclude independent candidates.

16 Instead, the Complainants appear to use Young's name recognition threshold as a
17 springboard to another argument: that the cost of achieving 15 percent vote share is prohibitively
18 high for independent candidates. Indeed, the Schoen Report starts from the premise that 60-80
19 percent name recognition is necessary to gain a 15 percent vote share and estimates the amount
20 of money that an independent candidate would need to spend to reach 60-80 percent name
21 recognition. This approach is similarly based on significant assumptions that reduce its value.

¹⁰⁷ *Poll Results: Third Party Candidates*, YOUGov (Aug. 25-26, 2016), available at
https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/wc35k48hrs/tabs_HP_Third_Party_Candidates_20160831.pdf.

1 Notably, the Schoen Report bases its estimation of campaign and media costs on the
2 assumption that independent candidates are unable to attract earned media (*i.e.*, free coverage).
3 Schoen presumes that "the media will not cover an independent candidate until they are certainly
4 in the debates. Thus, they must pay for all their media" ¹⁰⁸ This premise is unfounded.

5 Notably, media coverage from the most recent presidential election demonstrates that the two
6 leading independent candidates — Libertarian Gary Johnson and Green Party candidate Jill Stein
7 — received extensive media coverage. ¹⁰⁹

8 Furthermore, Schoen's supposition is based in part on research published in 1999, ¹¹⁰
9 which seems entirely inappropriate, given the rise of digital and social media and independent
10 expenditure-only political committees ("IEOPCs") in the years that have followed.

11 Digital and social media have provided more economical avenues for candidates'
12 messages, while social media has also enabled the ubiquitous sharing of those messages among
13 vast global networks. ¹¹¹ The most recent election especially highlighted the impact of changing
14 media. In the final months of the 2016 election, Hillary Clinton spent more than \$200 million on
15 television ads; Donald Trump spent less than half of that, by focusing his spending on digital
16 platforms like Facebook and Twitter. ¹¹² Digital and social media not only served as a cheaper
17 avenue for paid media, but also generated earned media when more traditional news outlets

¹⁰⁸ Schoen Report, *supra* note 35, at 3, 5.

¹⁰⁹ See, e.g., Supp. Brown Decl., *supra* note 5, ¶ 16 (identifying over 60 appearances by Johnson and Stein in media outlets including ABC, CBS, CNN, Fox, MSNBC, CNBC, PBS, C-SPAN, *USA Today*, *Time*, *People*, the *New York Times*, and others).

¹¹⁰ Schoen Report, *supra* note 35, at 4 (citing Paul Hermson & Rob Fauchaux, *Outside Looking In: Views of Third Party and Independent Candidates*, CAMPAIGNS & ELECTIONS (Aug. 1999)).

¹¹¹ 6869 Resp. n.4 (citing Clair Cain Miller, *How Obama's Internet Campaign Changed Politics*, N.Y. TIMES (Nov. 7, 2008); Derek Prall, *The Social Soapbox: How Social Media and Data Analytics are Helping Grassroots Candidates Gain Legitimacy*, AM. CITY & COUNTY (Oct. 22, 2014)); 6942 Resp. n.4 (same).

¹¹² See Issie Lapowsky, *Here's How Facebook Actually Won Trump the Presidency*, WIRED (Nov. 15, 2016), <https://www.wired.com/2016/11/facebook-won-trump-election-not-just-fake-news/>.

covered noteworthy tweets and posts.¹¹³ In addition, digital media reportedly replaced field offices for the Trump campaign, thereby reducing another traditional campaign cost.¹¹⁴ This change in traditional campaign strategies — a phenomena that intensified in 2016, but began in earnest in the 2008 election cycle¹¹⁵ — dramatically undermines Schoen's assumptions about the avenues of media exposure available to independent candidates and their associated costs.

Furthermore, with the rise of IEOPCs — several of which supported Libertarian candidate Gary Johnson in 2016¹¹⁶ — paid media in support of a particular candidate may be created and distributed by entities other than the candidate and his or her principal campaign committee. Such independent support likely increases a candidate's name recognition at no cost to the candidate, thereby reducing the total sum that the candidate must spend to achieve 60-80 percent name recognition. In addition, IEOPCs may raise unlimited funds from individuals and from sources, like corporations, otherwise prohibited under the Act. Thus, the existence of IEOPCs also undermines the dated Schoen Report's conclusions about the number of individual donations needed to reach Young's 60-80 percent name recognition threshold.¹¹⁷

The most recent elections demonstrate how Complainants' failure to consider recent developments undermines their conclusions. As noted above, Libertarian candidate Gary

¹¹³ *Id.*

¹¹⁴ Matthew Tyson, *How Digital Marketing Helped Donald Trump Win*, HUFFINGTON POST (Dec. 19, 2016), http://www.huffingtonpost.com/matthew-tyson/how-digital-marketing-hel_b_13721224.html.

¹¹⁵ Claire Cain Miller, *How Obama's Internet Campaign Changed Politics*, N.Y. TIMES (Nov. 7, 2008), https://bits.blogs.nytimes.com/2008/11/07/how-obamas-internet-campaign-changed-politics/?_r=0; Sarah Lai Stirland, *Propelled by Internet, Barack Obama Wins Presidency*, WIRED (Nov. 4, 2008), <https://www.wired.com/2008/11/propelled-by-in/>.

¹¹⁶ See Independent Expenditures in Support or Opposition to Gary Johnson, 2016 Cycle, OPEN SECRETS, <https://www.opensecrets.org/pres16/outside-spending?id=N00033226> (last visited March 8, 2017) (listing six IEOPCs that reported independent expenditures supporting Johnson in 2016, including two that spent over \$1 million).

¹¹⁷ Schoen Report, *supra* note 35, at 24-25 (estimating independent candidate's "hypothetical average donation").

1 Johnson achieved 63 percent name recognition shortly before Labor Day 2016. This was a
2 significant increase from just 34 percent three months earlier.¹¹⁸ Yet to reach 63 percent name
3 recognition, Johnson raised only \$7.9 million and spent only \$5.4 million,¹¹⁹ a mere 2-3 percent
4 of the \$266 million that Schoen estimates an independent candidate would need to achieve 60-80
5 percent name recognition.

6 Finally, it is worth noting that independent candidates frequently do not start from zero in
7 terms of either name recognition or fundraising. Notably, Gary Johnson and George Wallace,
8 who ran as an independent candidate in 1968, were both governors before running for president
9 and presumably enjoyed at least regional recognition. Similarly, several independent candidates
10 — including Ross Perot — have been independently wealthy and able to fund significant
11 portions of their own campaigns. And indeed, former New York mayor Michael Bloomberg's
12 preexisting name recognition¹²⁰ and significant personal wealth were among the qualities that
13 drew him significant attention as a potential independent candidate in 2016.¹²¹ That candidates
14 may start with some name recognition or financial resources further belies the Complaints'
15 critique about the onerous fundraising required to reach 60-80 percent name recognition and the
16 15 percent polling threshold.

¹¹⁸ *Poll Results: Gary Johnson*, YOUNGOV (May 25-26, 2016), available at <https://today.yougov.com/news/2016/08/31/poll-results-third-party-candidates/>.

¹¹⁹ February Monthly Rpt. of Gary Johnson 2016, FEC (Feb. 20, 2016); Amended Mar. Monthly Rpt. of Gary Johnson 2016, FEC (June 20, 2016); Amended Apr. Monthly Rpt. of Gary Johnson 2016, FEC (June 20, 2016); Amended May Monthly Rpt. of Gary Johnson 2016, FEC (June 20, 2016); June Monthly Rpt. of Gary Johnson 2016, FEC (June 20, 2016); Amended July Monthly Rpt. of Gary Johnson 2016, FEC (Aug. 20, 2016); Aug. Monthly Rpt. of Gary Johnson 2016, FEC (Aug. 20, 2016); Sept. Monthly Rpt. of Gary Johnson 2016, FEC (Sept. 20, 2016).

¹²⁰ See Michelle Hackman, *Bloomberg Wants to Save Everyone from Trump. But a Lot of People Don't Know Who He Is*, VOX (Jan. 23, 2016), <http://www.vox.com/2016/1/21/10810624/michael-bloomberg-third-party-bid> (reporting on a poll finding that, contrary to the title's characterization, roughly 57 percent of voters had an opinion on Bloomberg).

¹²¹ See Alexander Burns and Maggie Haberman, *Bloomberg, Sensing an Opening, Revisits a Potential White House Run*, N.Y. TIMES (Jan. 23, 2016), <https://www.nytimes.com/2016/01/24/nyregion/bloomberg-sensing-an-opening-revisits-a-potential-white-house-run.html>.

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1 In sum, the reports by Young and Schoen do not provide a sufficient basis to conclude
2 that CPD's 15 percent participation threshold is a level of support so high that only the
3 Democratic and Republican nominees could reasonably achieve it. Taken together with the
4 Commission's judicially upheld determinations that independent candidates of the past *have*
5 reached 15 percent in the polls,¹²² the Complainants' reports do not provide reason to believe
6 that CPD's 15 percent criteria violated the requirement to use objective candidate-selection
7 criteria for staging debates.

8 2. Evidence on Purported Unreliability of Polling Data

9 Finally, Complainants allege that CPD's 15 percent threshold is not objective because the
10 fact that CPD selects both the cutoff date for the application of its debate criteria and the polls to
11 consider allows CPD to manipulate the criteria favor of Democratic and Republican interests.¹²³
12 Citing the Young Report, Complainants also contend that polling in races with more than two
13 candidates is subject to increased inaccuracy.¹²⁴ As to the first allegation, there is no information
14 in the Complaint suggesting that CPD has manipulated the dates on which it applies its criteria to
15 reach a particular result. Likewise, there is no information in the record to indicate that any
16 candidates have been excluded by virtue of the polling deadline or that past independent
17 candidates would have been admitted to a debate had CPD relied on different polling sources.

18 With regard to the selection of polls, CPD's independent polling expert, Frank M.
19 Newport, Editor-in-Chief of Gallup Organization, affirms in a sworn declaration that he has
20 recommended which polls CPD should use in every election since 2000, based on, "the quality
21 of the methodology employed, the reputation of the polling organizations and the frequency of

¹²² *Buchanan*, 112 F. Supp. 2d at 73.

¹²³ 6869 Compl. at 41-45.

¹²⁴ *Id.* at 41-42.

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1 the polling conducted.”¹²⁵ Newport states that he made the recommendations based solely “upon
2 my professional judgement and without any partisan purpose or pre-determined result in mind”
3 and that CPD has always adopted his recommendations.¹²⁶ The Newport declaration further lists
4 the polls selected in each cycle between 2000 and 2012, and indicates that, with few exceptions,
5 CPD relied on the same five polling organizations, thus lending a relative degree of predictability
6 to the polling used. Newport also affirms that “it is neither feasible nor appropriate to include
7 every candidate’s name in a public opinion poll,” but that based on his experience, “it is
8 extraordinarily unlikely that a poll would fail to identify and include among the candidates listed
9 in polling questions a candidate whose level of support is anywhere near 15 percent of the
10 national electorate.”¹²⁷ The Complaint’s speculation about the possibility of an independent
11 candidate being excluded by CPD’s selection of polls is unpersuasive in the face of Newport’s
12 sworn attestations.

13 Lastly, relying on the Young Report, the Complaints suggest that polling in three-way
14 races is subject to increased inaccuracy, as compared to polling in two-way races.¹²⁸ In
15 particular, the Young Report concludes that sampling (*i.e.*, sample size) and non-sampling (*e.g.*,
16 coverage bias, election salience, and strategic voting) errors are greater in three-way

¹²⁵ 6869 Resp. Ex. 2 (Declaration of Frank M. Newport) (“Newport Decl.”). Among the polls used between 2000 and 2012 were those conducted by ABC News and the *Washington Post*, NBC News and the *Wall Street Journal*, CBS News and the *New York Times*, Fox News and Opinion Dynamic, and CNN, *USA Today* and Gallup. *Id.* According to Newport, “these organizations’ polls would be conducted in a responsible and professional manner that meets the industry standards and reflects the then-current advances in polling methodology.” *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ 6869 Compl. at 42.

gubernatorial races studied¹²⁹ and that the error rates are especially high for candidates on the cusp of CPD's 15 percent threshold.¹³⁰

Reliance on this conclusion is problematic for several reasons. First, Young's metric for polling error appears to be based on the difference between the poll and the actual results on Election Day.¹³¹ However, CPD does not purport to use the polls as predictors of what will occur on Election Day, but as a reliable measure of candidates' support at a given moment in September. Indeed, as the Newport Declaration notes, "[p]olls are estimates and imperfect predictors of future events" but, according to Newport, "there is no doubt that properly conducted polls remain the best measure of public support for a candidate . . . at the time the polls are conducted."¹³²

Newport further disagrees with the Young Report's reliance on three-way gubernatorial election polling to draw conclusions about the effect of sampling error on independent presidential candidates on the cusp of CPD's 15 percent threshold. Specifically, Newport states that presidential election polling is "inherently more reliable than is polling in low turn-out elections," as polls in mid-term state elections are "generally more subject to sampling and non-sampling errors than national polls which are used by CPD in presidential elections."¹³³ Newport further asserts that "nothing about support for a significant third party-candidate [sic] [] makes it more difficult to measure."¹³⁴

¹²⁹ Young Report, *supra* note 34, at 18-28.

¹³⁰ *Id.* at 18.

¹³¹ *Id.* at 25-26. Young uses as his metric the "average absolute difference" ("AAD") — a measure of the average difference between each candidate's actual result on Election Day and his or her polled vote share in a given poll.

¹³² Newport Decl., *supra* note 125, ¶ 21.

¹³³ *Id.* ¶ 19.

¹³⁴ *Id.* ¶ 21.

1 Having carefully weighed and considered the analyses of the parties' respective experts,
2 we do not believe the available information is sufficient to conclude that the polling data
3 employed by CPD are not an objective means of measuring public support for presidential
4 candidates at a moment in time. In particular, we note that all candidates must abide by the same
5 polls, and thus equally endure whatever errors may be present. Moreover, as the court noted in
6 *Buchanan*, such error may just as likely result in over inclusion of candidates shy of the 15
7 percent threshold.¹³⁵ And although the Complainants present information suggesting that
8 independent gubernatorial candidates may be disproportionately impacted by polling errors, it is
9 not clear that independent presidential candidates are similarly impacted.

10 In conclusion, the new information presented to the Commission asserting the
11 impracticability of the 15 percent threshold for independent candidates and on the unreliability of
12 polling are not sufficient to support a reasonable inference that the CPD's criteria for selecting its
13 debate participants are not objective within the meaning of 11 C.F.R. § 110.13(c).

14 **3. Complainants' Policy Arguments**

15 Much of the remaining information included with the Complaints pertains to policy
16 arguments about the particular challenges that independent candidates face in the two-party
17 dominant system, the reasons why independent candidates should be included in debates, or the
18 benefits of alternative selection criteria. However, these points, no matter how compelling, do
19 not bear on the Commission's consideration of whether or not the 15 percent threshold is an
20 objective criteria and, most fundamentally, whether CPD's use of such a criteria results in
21 prohibited in-kind corporate contributions from CPD to debate participants.

¹³⁵ *Buchanan*, 112 F. Supp. 2d at 75.

1 As the Commission has previously explained in related rulemaking proceedings, "the rule
2 at section 110.13(c) . . . is not intended to maximize the number of debate participants; it is
3 intended to ensure that staging organizations do not select participants in such a way that the
4 costs of a debate constitute corporate contributions to the candidates taking part."¹³⁶ Thus, the
5 relevant inquiry is not whether CPD's 15 percent threshold "den[ies] voters a viable alternative
6 to the Republican and Democratic parties that Americans increasingly feel have failed the
7 nation,"¹³⁷ as Complainants urge, but whether that threshold is objective and thereby "avoids the
8 real or apparent potential for a *quid pro quo*" between a corporate debate sponsor and a party or
9 candidate. As described above, there is insufficient information to support a reasonable inference
10 that CPD's criteria are not objective, which ends the Commission's inquiry in this allegation.

11 **V. CONCLUSION**

12 For the reasons stated above, we recommend that the Commission find no reason to
13 believe that CPD, Fahrenkopf, and McCurry as co-chairs, and the ten named officers and board
14 members violated 52 U.S.C. §§ 30116(f) or 30118(a) by making prohibited contributions and
15 expenditures and accepting prohibited contributions, and no reason to believe that CPD violated
16 52 U.S.C. §§ 30103 or 30104 by failing to register and report as a political committee.

¹³⁶ *Candidate Debates*, 80 Fed. Reg. 72,616, 72,617 (Nov. 20, 2015).

¹³⁷ 6869 Compl. at 2.

IV. RECOMMENDATIONS

1. Find no reason to believe that the Commission on Presidential Debates, Frank Fahrenkopf Jr. as Co-Chair, Michael D. McCurry as Co-Chair, Janet H. Brown, Howard G. Buffet, John C. Danforth, John Griffen, Antonia Hernandez, John I. Jenkins, Newton N. Minow, Richard D. Parsons, Dorothy S. Ridings, and Alan K. Simpson violated 52 U.S.C. §§ 30116(f) or 30118(a);
2. Find no reason to believe the Commission on Presidential Debates violated 52 U.S.C. §§ 30103 or 30104;
3. Approve the attached Factual & Legal Analysis;
4. Approve the appropriate letters;
5. Close the file.

Lisa J. Stevenson
Acting General Counsel

3-15-17
Date

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